



STATE BOARD OF EQUALIZATION

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First District, San Francisco

SEN. GEORGE RUNNER (Ret.)
Second District, Lancaster

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Third District, Orange County

JEROME E. HORTON
Fourth District, Los Angeles

JOHN CHIANG
State Controller

CYNTHIA BRIDGES
Executive Director

September 12, 2014

Dear Interested Party:

Enclosed are the Agenda, Issue Paper, and Revenue Estimate for the September 23, 2014 Business Taxes Committee meeting. This meeting will address the proposed amendments to Regulation 1588, *Seeds, Plants and Fertilizer*, to specifically include carbon dioxide in the definition of fertilizer.

Please feel free to publish this information on your website or otherwise distribute it to your associates, members, or other persons that may be interested in this issue.

Thank you for your input on these issues and I look forward to seeing you at the Business Taxes Committee meeting at **10:00 a.m. on September 23, 2014** in Room 121 at the address shown above.

Sincerely,

A handwritten signature in cursive script that reads "Susanne Buehler".

Susanne Buehler, Chief
Tax Policy Division
Sales and Use Tax Department

SB:rsw

Enclosures

cc: (all with enclosures)

Honorable Jerome E. Horton, Chairman, Fourth District
Honorable Michelle Steel, Vice Chair, Third District
Honorable Betty T. Yee, Member, First District (MIC:71)
Senator George Runner (Ret.), Member, Second District (via email)
Honorable John Chiang, State Controller, c/o Ms. Marcy Jo Mandel

(via email)

Mr. David Hunter, Board Member's Office, Fourth District
Ms. Jaclyn Appleby, Board Member's Office, Fourth District
Mr. Neil Shah, Board Member's Office, Third District
Mr. Tim Treichelt, Board Member's Office, Third District
Mr. Alan LoFaso, Board Member's Office, First District
Ms. Mengjun He, Board Member's Office, First District
Ms. Yvette Stowers, Board Member's Office, First District
Mr. Ramon Salazar, Board Member's Office, First District
Mr. Sean Wallentine, Board Member's Office, Second District
Mr. James Kuhl, Board Member's Office, Second District
Mr. Lee Williams, Board Member's Office, Second District
Mr. Alan Giorgi, Board Member's Office, Second District
Ms. Tanya Vandrick, Board Member's Office, Second District
Ms. Natasha Ralston Ratcliff, State Controller's Office
Ms. Cynthia Bridges (MIC:73)
Mr. Randy Ferris (MIC:83)
Mr. David Gau (MIC:101)
Mr. Marc Alviso (MIC:101)
Mr. Chris Lee (MIC:101)
Mr. John Thiella (MIC:73)
Mr. Jeffrey L. McGuire (MIC:43)
Mr. Robert Tucker (MIC:82)
Mr. Bradley Heller (MIC:82)
Mr. Lawrence Mendel (MIC:82)
Ms. Monica Silva (MIC:82)
Ms. Kirsten Stark (MIC:50)
Mr. Clifford Oakes (MIC:50)
Mr. Bradley Miller (MIC:92)
Mr. Michael Patno (MIC:50)
Mr. Robert Wilke (MIC:50)

AGENDA — September 23, 2014 Business Taxes Committee Meeting
Proposed Amendments to Regulation 1588, *Seeds, Plants and Fertilizer*

<p>Action 1 — Agreed Upon Items</p> <p>See Agenda, page 2</p>	<p>Alternative 1</p> <p>Approve and authorize publication of proposed amendments to Regulation 1588 to clarify that carbon dioxide is included in the definition of “fertilizer.”</p> <p style="text-align: center;">OR</p> <p>Alternative 2</p> <p>Do not approve proposed amendments to Regulation 1588.</p>
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AGENDA — September 23, 2014 Business Taxes Committee Meeting **Proposed Amendments to Regulation 1588, *Seeds, Plants and Fertilizer***

<p>Action 1 — Staff Recommendation</p>	<p>REGULATION 1588. SEEDS, PLANTS AND FERTILIZER.</p> <p>(a) SEEDS AND PLANTS. Tax does not apply to sales of seeds, annual plants, and operative January 1, 1999, non-annual plants, the products of which ordinarily constitute food for human consumption or the products of which are to be sold in the regular course of the purchaser's business, including fruit trees, berry vines, and grape rootlings or rootstock, or cuttings of every variety. Tax does not apply to sales of seed, the products of which will be used as feed for any form of animal life of a kind the products of which ordinarily constitute food for human consumption or the products of which are to be sold in the regular course of the purchaser's business.</p> <p>(b) FERTILIZER.</p> <p>(1) DEFINITION. The term "fertilizer" includes commercial fertilizers, agricultural minerals, and manure, and carbon dioxide. The terms "commercial fertilizers" and "agricultural minerals" as used herein are defined in §sections 14522 (commercial fertilizer) and 14512 (agricultural minerals) of the Food and Agricultural Code. "Manure" means the excreta of any domestic animal or domestic fowl which is not artificially mixed with any material except a material which has been used for bedding, sanitary, or feeding purposes for such an animal or fowl or for the preservation of the manure. The term "fertilizer" does not include "<u>packaged</u> soil amendments" or "auxiliary soil and plant substances" as these terms are defined (with the exceptions noted below) in §sections 14552 (<u>packaged</u> soil amendments) and 14513 (auxiliary soil and plant substances) of the Food and Agricultural Code. For <u>the</u> purposes of this regulation, "manures sold without guarantees for plant nutrients" as described in §section 14552 of the Food and Agricultural Code are not <u>packaged</u> soil amendments <u>and carbon dioxide is not an auxiliary soil and plant substance as that term is defined in section 14513 of the Food and Agricultural Code.</u></p> <p>(2) APPLICATION OF TAX. Tax does not apply to sales of fertilizer to be applied to land or (including in foliar application) the products of which are to be: (a) used as food for human consumption, (b) used as feed for any form of animal life of a kind the products of which ordinarily constitute food for human consumption, or (c) sold in the regular course of the purchaser's business.</p> <p>When insecticides are mixed with fertilizer and the mixture sold, that portion of the total price allocable to the fertilizer may be excluded from the measure of the tax if the mixed product is applied to land or (including in foliar application) the products of which are to be: (a) used as food for human consumption, (b) used as feed for any form of animal life of a kind the products of which ordinarily constitute food for human consumption, or (c) sold in the regular course of the purchaser's business.</p>
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Issue Paper Number **14-005**



BOARD OF EQUALIZATION
KEY AGENCY ISSUE

- ☐ Board Meeting
- ☒ Business Taxes Committee
- ☐ Customer Services and
Administrative Efficiency
Committee
- ☐ Legislative Committee
- ☐ Property Tax Committee
- ☐ Other

Proposed Amendments to Regulation 1588, *Seeds, Plants and Fertilizer* (Carbon Dioxide)

I. Issue

Whether the Board should amend Regulation 1588, *Seeds, Plants and Fertilizer*, to specifically include carbon dioxide in the definition of fertilizer.

II. Alternative 1 – Staff Recommendation

Staff recommends the Board approve and authorize publication of the proposed amendments to Regulation 1588, as set forth in Exhibit 2. Staff’s proposed amendments clarify that carbon dioxide is included in the definition of “fertilizer.” This recommendation is supported by Mr. John Gamper from the California Farm Bureau.

For a more detailed explanation of Alternative 1 - Staff Recommendation, refer to section VI of this paper.

III. Other Alternatives Considered

Do not approve the proposed amendments to Regulation 1588.

IV. Background

Revenue and Taxation Code section [6358](#), *Animal life; feed; seeds; plants; fertilizer*, subdivision (d) provides an exemption from tax for the gross receipts from the sale and use of fertilizer applied to land, the products of which are to be used as food for human consumption or are to be sold in the regular course of business. For purposes of this exemption, Regulation 1588, *Seeds, Plants and Fertilizer*, defines “fertilizer.”

The current provisions of Regulation 1588, subdivision (b)(1) define the term “fertilizer” to include manure, commercial fertilizers (as defined in Food and Agricultural Code (Food & Agr. Code) section 14522), and agricultural minerals (as defined in Food & Agr. Code section 14512). Specifically excluded from the definition of fertilizer in Regulation 1588 are soil amendments (as defined in Food & Agr. Code section 14552) and auxiliary soil and plant substances (as defined in Food & Agr. Code section 14513). (See Exhibit 3 for relevant Food & Agr. Code definitions.)

The Sales and Use Tax Department’s (SUTD) regulation files show that the exemption is based on the premise that fertilizer is applied to land for the purpose of furnishing elements to be absorbed by the plant. Those elements enter into the food supply of the plants themselves and become a part of the product grown. If that product is sold, the fertilizer is not taxable as it is regarded as a sale for resale. The same reasoning applies to products grown for human consumption and to products used as feed for animal life that are food for human consumption. The absorption of the fertilizer into the food supply of the plants themselves is different than the function of soil amendments or auxiliary soil and plant substances, which do not, in any material quantity, enter into the food supply of the plants themselves, and are not included in the definition of fertilizer.

V. Discussion

Staff has previously considered carbon dioxide to be fertilizer when applied to land in farming. This direction is found in Sales and Use Tax Annotation¹ 510.0580:

Carbon Dioxide. Carbon dioxide sold at retail to farmers for application to their land to assist in the neutralization of alkaline soils, qualifies as a "fertilizer." 5/6/60.

The backup letter to the annotation explains that in the examined situation, carbon dioxide was sold to farmers for application to land through their irrigation systems. At the time the legal opinion was written, the Department of Agriculture considered carbon dioxide sold for such a purpose to be an agricultural mineral, which was included in the definition of fertilizer for sales and use tax purposes.

More recently, a question has arisen as to whether carbon dioxide, when used by a hydroponic² farmer, should be considered fertilizer as it was not applied to land. In the particular case in question, the carbon dioxide is converted to a gaseous form that is delivered to the plants through a perforated tube at or near ground level. The carbon dioxide percolates up and is absorbed by the leaves of the plant (foliar application) in order to support the life of the plant. After reviewing the current Food & Agr. Code definitions, SUTD staff questioned whether carbon dioxide should be considered an

¹ Annotations, which are published in the Business Taxes Law Guide, are summaries of conclusions reached by staff counsel as applied to specific factual situations. They are a research tool intended to provide guidance regarding the interpretation of Board statutes and regulations. Annotations are not regulations and do not have the force or effect of law.

² Hydroponics is a subset of hydroculture and is a method of growing plants using mineral nutrient solutions, in water, without soil.

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agricultural mineral, which is included in the definition of fertilizer, or an auxiliary soil and plant substance, which is not.

Revising Regulation 1588 to specifically include carbon dioxide in the definition of fertilizer, and specifying that carbon dioxide is not an auxiliary soil and plant substance for sales and use tax purposes, is consistent with the Board's historical treatment of carbon dioxide as fertilizer, and its use is consistent with the basis for the exemption from tax as a fertilizer. Specifically, the carbon dioxide is used for the purpose of furnishing an element to be absorbed by the plant itself, thereby becoming a part of the plant's growth.

VI. Alternative 1 - Staff Recommendation

A. Description of Alternative 1

Staff recommends the Board approve and authorize publication of the proposed amendments to Regulation 1588, as provided in Exhibit 2, to:

- Specify that the term fertilizer includes carbon dioxide. (Subdivision (b)(1).)
- Provide that carbon dioxide is not an auxiliary soil and plant substance as that term is defined in Food & Agr. Code section 14513. (Subdivision (b)(1).)
- Clarify that the exemption may apply to sales of fertilizer applied to land or in foliar application. (Subdivision (b)(2).)
- Update references from "soil amendments" to "packaged" soil amendments to be consistent with Food & Agr. Code section 14552. (Subdivision (b)(1).)

B. Pros of Alternative 1

Provides clear guidance to taxpayers and Board of Equalization (BOE) staff regarding the application of tax to carbon dioxide sold as a fertilizer.

C. Cons of Alternative 1

None.

D. Statutory or Regulatory Change for Alternative 1

No statutory change is required. However, staff's recommendation does require a regulatory change.

E. Operational Impact of Alternative 1

Staff will publish the proposed amendments to Regulation 1588 and begin the formal rulemaking process. Staff will also revise any applicable publications relevant to the proposed amendments.

F. Administrative Impact of Alternative 1

1. Cost Impact

The workload associated with publishing the regulation and updating the publication is considered routine. Any corresponding cost would be absorbed within the BOE's existing budget.

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2. Revenue Impact

None. See Revenue Estimate (Exhibit 1).

G. Taxpayer/Customer Impact of Alternative 1

Amendments to Regulation 1588 to expressly provide that carbon dioxide is considered fertilizer will clarify the issue for BOE staff and taxpayers.

H. Critical Time Frames of Alternative 1

None.

VII. Alternative 2

A. Description of Alternative 2

Do not amend Regulation 1588.

B. Pros of Alternative 2

The BOE will not incur the workload associated with revising the regulation.

C. Cons of Alternative 2

Taxpayers and BOE staff would not have guidance beyond Annotation 510.0580 to explain the application of tax to carbon dioxide.

D. Statutory or Regulatory Changes for Alternative 2

None.

E. Operational Impact of Alternative 2

None.

F. Administrative Impact of Alternative 2

1. Cost Impact

None.

2. Revenue Impact

None. See Revenue Estimate (Exhibit 1).

G. Taxpayer/Customer Impact of Alternative 2

Without the regulatory amendment, there may continue to be confusion regarding whether carbon dioxide should be considered a fertilizer.

H. Critical Time Frames for Alternative 2

None.

Preparer/Reviewer Information

Prepared by: Tax Policy Division, Sales and Use Tax Department

Current as of: September 4, 2014

REVENUE ESTIMATE

STATE OF CALIFORNIA
BOARD OF EQUALIZATION



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II. Alternative 1 - Staff Recommendation

Staff recommends the Board approve and authorize publication of the proposed amendments to Regulation 1588. Staff's proposed amendments clarify that carbon dioxide is included in the definition of "fertilizer." This recommendation is supported by Mr. John Gamper from the California Farm Bureau.

III. Other Alternative(s) Considered

Do not approve proposed amendments to Regulation 1588.

Background, Methodology, and Assumptions

Alternative 1 – Staff Recommendation

There is nothing in the staff recommendation that would have an impact on revenues. Staff recommendation will provide clear guidance to taxpayers and Board of Equalization (BOE) staff regarding the application of tax to carbon dioxide sold as a fertilizer.

Other Alternatives Considered

Do not amend Regulation 1588.

Revenue Summary

Alternative 1 – staff recommendation does not have a revenue impact.

The other alternative considered does not have a revenue impact.

Preparation

Mr. Bill Benson, Jr., Research and Statistics Section, Legislative and Research Division, prepared this revenue estimate. This estimate has been reviewed by Mr. Joe Fitz, Chief, Research and Statistics Section, Legislative and Research Division, and Ms. Susanne Buehler, Chief, Tax Policy Division, Sales and Use Tax Department. For additional information, please contact Mr. Benson at (916) 445-0840.

Current as of September 4, 2014.

REGULATION 1588. SEEDS, PLANTS AND FERTILIZER.

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When insecticides are mixed with fertilizer and the mixture sold, that portion of the total price allocable to the fertilizer may be excluded from the measure of the tax if the mixed product is applied to land ~~or (including in foliar application)~~ the products of which are to be: (a) used as food for human consumption, (b) used as feed for any form of animal life of a kind the products of which ordinarily constitute food for human consumption, or (c) sold in the regular course of the purchaser's business.

FOOD AND AGRICULTURAL CODE – (FOOD & AGR. CODE)

DIVISION 7. AGRICULTURAL CHEMICALS, LIVESTOCK REMEDIES, AND COMMERCIAL FEEDS [12500 - 15340]

(Division 7 enacted by Stats. 1967, Ch. 15.)

CHAPTER 5. Fertilizing Materials [14501 - 14682]

(Chapter 5 repealed and added by Stats. 1990, Ch. 504, Sec. 2.)

ARTICLE 2. Definitions [14511 - 14564]

(Article 2 added by Stats. 1990, Ch. 504, Sec. 2.)

Included in “fertilizer” per Regulation 1588

14512.

“Agricultural mineral” means any substance with nitrogen (N), available phosphoric acid (P₂O₅), and soluble potash (K₂O), singly or in combination, in amounts less than 5 percent which is distributed for farm use, or any substance only containing recognized essential secondary nutrients or micronutrients in amounts equal or greater than minimum amounts specified by the director, by regulation, and distributed in this state as a source of these nutrients for the purpose of promoting plant growth. It shall include gypsum, liming materials, manure, wood fly ash, sewage sludge not qualifying as commercial fertilizer, and captured dilute solutions.

(Repealed and added by Stats. 1990, Ch. 504, Sec. 2.)

14522.

“Commercial fertilizer” means any substance which contains 5 percent or more of nitrogen (N), available phosphoric acid (P₂O₅), or soluble potash (K₂O), singly or collectively, which is distributed in this state for promoting or stimulating plant growth. “Commercial fertilizer” includes both agricultural and specialty fertilizers. “Specialty fertilizers” may contain less than 5 percent nitrogen (N), available phosphoric acid (P₂O₅), or soluble potash (K₂O), singly or collectively.

(Repealed and added by Stats. 1990, Ch. 504, Sec. 2.)

Specifically excluded per Regulation 1588 (except for 14552(h))

14513.

“Auxiliary soil and plant substance” means any chemical or biological substance or mixture of substances or device distributed in this state to be applied to soil, plants, or seeds for soil corrective purposes; or that is intended to improve germination, growth, yield, product quality, reproduction, flavor, or other desirable characteristics of plants; or that is intended to produce any chemical, biochemical, biological, or physical change in soil; but does not include commercial fertilizers, agricultural minerals, pesticides, soil amendments, or manures. It shall include the following:

- (a) Bacterial inoculants.
- (b) Biotics.
- (c) Lignin or humus preparations.
- (d) Microbial products, including genetically engineered microorganisms.
- (e) Soil binding agents.
- (f) Synthetic polyelectrolytes.
- (g) Wetting agents to promote water penetration.
- (h) Any similar product intended to be used for influencing soils, plant growth, or crop or plant quality.

(Amended by Stats. 1996, Ch. 361, Sec. 99. Effective January 1, 1997.)

14552.

“Packaged soil amendment” means any substance distributed for the purpose of promoting plant growth or improving the quality of crops by conditioning soils solely through physical means. It includes all of the following:

- (a) Hay.
- (b) Straw.
- (c) Peat moss.
- (d) Leaf mold.
- (e) Sand.
- (f) Wood products.
- (g) Any product or mixture of products intended for use as a potting medium, planting mix, or soilless growing media.
- (h) Manures sold without guarantees for plant nutrients.
- (i) Any other substance or product which is intended for use solely because of its physical properties.

(Repealed and added by Stats. 1990, Ch. 504, Sec. 2.)